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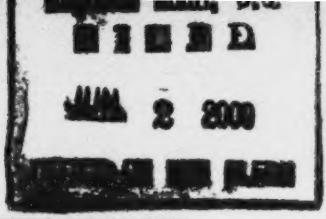

No. 99-1596

IN THE

Supreme Court of the United States

CARNIVAL CRUISE LINES, INC.; HAL ANTILLEN, N.V.; HAL SHIPPING, LTD.; WIND SURF LIMITED; HOLLAND AMERICA LINE, N.V.; and HAL CRUISES LIMITED,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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21 pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that the doctrine of severability empowers federal courts to rewrite an unconstitutional statute in order to preserve constitutional applications of the statute that are not textually distinct from its unconstitutional applications.

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IN THE

Supreme Court of the United States

No. 99-1596

CARNIVAL CRUISE LINES, INC.; HAL ANTILLEN, N.V.; HAL SHIPPING, LTD.; WIND SURF LIMITED; HOLLAND AMERICA LINE, N.V.; and HAL CRUISES LIMITED,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus curiae the International Council of Cruise Lines ("ICCL") respectfully submits this brief in support of petitioners' request for certiorari.[1]

[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners Carnival Cruise Lines, Inc., and Holland

[Footnote continued on next page]

INTEREST OF *AMICUS CURIAE*

ICCL is a Washington, D.C.-based, non-profit trade association that represents the interests of the 17 largest passenger cruise lines in the North American cruise market, and more than 50 national and international cruise industry suppliers. ICCL member lines operate 95 vessels that call upon major ports in the United States and abroad. These vessels, all of which engage in international commerce, carry nearly six million passengers each year and account for approximately 90% of the North American passenger cruise line industry. The mission of the ICCL is to participate in the lawmaking, regulatory, judicial, and policy development processes to help ensure that all legal measures applicable to the passenger cruise line industry are consistent with the industry's goals of providing a safe, secure, healthy, and cost-effective vacation and travel experience.

All of ICCL's members, as well as the millions of Americans who take cruises from U.S. ports each year, are adversely affected by the discriminatory treatment of the cruise industry mandated by the court of appeals in this case. The effect of the decision below is to compel passenger cruise lines, together with their passengers and suppliers, to bear a disproportionately large share of the Harbor Maintenance Tax at issue in this case. That result flies directly in the face of Congress's clear intent in enacting the tax, which was to provide for a uniform levy equally applicable to all commercial shipping.

[Footnote continued from previous page]
America Line, N.V., are members of ICCL, but have made no special monetary contribution to the preparation of this brief. ICCL has financed this brief solely out of general operating funds derived from annual contributions from its members and other sources.

ICCL accordingly urges the Court to grant certiorari to review the egregiously incorrect decision below.

STATEMENT

This case presents the question whether courts are permitted to rewrite unconstitutional federal statutes in order to preserve constitutional applications of such statutes from invalidation, when the constitutional applications are not textually distinct from or functionally independent of the statute's unconstitutional applications. The test for severability adopted by this Court and by numerous courts of appeals precludes severance in these circumstances, but the decision below rejects these traditional limitations on severability in favor of an all-but-standardless inquiry that vests virtually unlimited law-making discretion in the courts. This Court's review is necessary to resolve this conflict among the authorities and reject the broad usurpation of legislative power effected by the decision below.

1. In 1986, Congress enacted the Harbor Maintenance Revenue Act, Pub. L. No. 99-662, tit. XIV, §§ 1401-07, 100 Stat. 4082, 4266-73 (1986), which *inter alia* established the Harbor Maintenance Tax ("Harbor Tax"). *Id.* § 1402(a), *codified at* 26 U.S.C. § 4461-4462. As originally enacted, the Harbor Tax was an ad valorem tax imposed on "any port use." 26 U.S.C. § 4461(a). Congress defined "port use" to include "the loading of commercial cargo on, or . . . the unloading of commercial cargo from, a commercial vessel at a port," and defined "commercial cargo" as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. § 4462(a)(1)(B) & (a)(3)(A).

In *United States v. United States Shoe Corp.* ("*U.S. Shoe*"), 523 U.S. 360 (1998), this Court held that the Harbor Tax violated the Export Clause of the United States Constitution, art. I, § 9, cl. 5, as applied to exports of goods. The *U.S. Shoe* decision did not address the

question whether application of the tax to other types of commerce was also unconstitutional, or could instead be preserved by severing it from the unconstitutional portions of the statute.

2. Petitioners brought this suit in the Court of International Trade to contest the assessment and maintenance of the Harbor Tax on passenger cruises that originate, stop, or terminate in ports covered by the tax. Relying on *U.S. Shoe*, the Court of International Trade held that transportation services provided to cruise line passengers are not subject to the Harbor Tax. Pet. App. 18a-23a. The government appealed.

3. In the court of appeals, petitioners argued *inter alia* that the Harbor Tax was invalid as applied to passengers because the tax on passengers was inextricably intertwined with the unconstitutional tax on exports and thus could not be severed. Petitioners noted that because the tax on passengers was not a separate and distinct statutory provision, *see* 26 U.S.C. §§ 4461(a), 4462(a)(1)(B) & (a)(3)(A), the only way the court could sever the passenger tax from the unconstitutional tax on exports was to rewrite the statute in an impermissible manner. Pet. C.A. Br. 20-31; Pet. App. 12a.

The court of appeals disagreed, holding that the passenger tax *could* be severed from the tax on exports. Pet. App. 10a-16a. In conducting its severability analysis, the court bypassed any inquiry into whether the constitutional and unconstitutional aspects of the tax were textually or functionally independent of one another—*i.e.*, whether the tax on exports could be deleted or excised from the statute in a way that left intact the remaining applications of the tax, including the passenger tax. Instead, after noting that this Court's "decisions dealing with the severability of invalid portions of a statute have used various formulations of the appropriate test for deciding the issue," the court of appeals held that the governing test hinged entirely on whether Congress would have enacted the statute absent the tax on exports:

"'the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.'" *Id.* at 11a. Accordingly, without regard to the inextricably intertwined nature of the various elements of the Harbor Tax, the court of appeals concluded that the tax on exported goods was severable from the other aspects of the tax, because "[i]t cannot be concluded that Congress would not have enacted the remainder of the Harbor Tax had it known that the application of the tax to exports would be invalid." *Id.* at 12a.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with this Court's longstanding rule that the judicial power to sever statutes is limited to the deletion or excision of unconstitutional language. Because the tax on passengers is not textually distinct from the unconstitutional tax on exports of goods, the court of appeals' "severance" of the passenger tax necessarily entailed more than mere deletion of unconstitutional provisions or phrases. Indeed, the Federal Circuit's expansive vision of severability empowers courts to rewrite statutes under the guise of severance—a clear invasion of the Legislature's province and a far cry from the delicate "textual surgery" authorized by this Court in *Reno v. ACLU*, 521 U.S. 844, 883 (1997). Review by this Court is necessary to clarify the limits of a court's power to modify federal statutes through severance.

The Federal Circuit's test for severability also conflicts with the test applied by several other courts of appeals. Although the Federal Circuit requires only a determination that Congress would have enacted the constitutional provisions of the law absent the unconstitutional provisions, other courts require an additional step: a determination that the unconstitutional provisions are "functionally independent" of the remainder of the statute. Under this test, if the unconstitutional provisions

are so intertwined with the valid provisions that a court would have to rewrite the law to enable it to stand, severance is improper. Because the structure of the Harbor Tax is such that the taxation of exports is inextricably intertwined with the taxation of passengers and imports, the Federal Circuit was compelled to disregard the requirement of functional independence in order to uphold the latter aspects of the tax.

I. The Court Of Appeals' Test For Severability Is Inconsistent With Decisions Of This Court

The decision below is impossible to reconcile with numerous decisions of this Court that limit a court's power to sever unconstitutional aspects of a federal statute in order to preserve other provisions of the same statute. Specifically, this Court has explained that the doctrine of severability grants courts the narrow power to *delete* or *excise* unconstitutional provisions—*not* the power to rewrite a statute to ensure its constitutionality. Yet rewriting is precisely what the court of appeals did here: Given the statutory language, it is impossible to preserve the passenger tax while invalidating the tax on exported goods through the deletion or excision of unconstitutional provisions. Indeed, the court did not identify—nor could it—the specific textual excisions that would eliminate the tax on exports of goods while preserving the remaining applications of the tax.

The Federal Circuit's reconfiguration of the Harbor Tax is patently inconsistent with *Reno v. ACLU*, 521 U.S. 844 (1997), where this Court considered a challenge to two provisions of the Communications Decency Act, 47 U.S.C. § 223. In *Reno*, the Government urged that if the Court were to conclude that the provisions were insufficiently tailored to pass constitutional muster, the Court should "honor" the statute's severability clause by "construing nonseverable terms narrowly," effectively rewriting the statute to satisfy constitutional requirements. *Id.* at 882. The Court rejected this argu-

ment, explaining that "*[a] severability clause requires textual provisions that can be severed.*" *Id.* at 882 (emphasis added).

The *Reno* Court accordingly held that the constitutional elements of the statute could be left intact only "in the one place where they are, in fact, severable." *Id.* at 882-83. That one place, the Court explained, was the "indecency" provision, which outlawed "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent." *Id.* at 883 (quoting 47 U.S.C. § 223(a)). Having held the ban on "indecent" communications unconstitutional, the Court ruled that the ban on "obscene" communications could be preserved simply by deleting the words "or indecent" from the statute. *Id.* The Court explained that severance was permissible in this instance because "*the restriction of 'obscene' material enjoys a textual manifestation separate from that for 'indecent' material.*" *Id.* (emphasis added). The Court proceeded to reject the remainder of the Government's severability argument, concluding that "[i]n no other respect . . . can [the statute] be saved by such a textual surgery." *Id.* As the Court emphasized, "[t]his Court 'will not rewrite a . . .' law to conform it to constitutional requirements." *Id.* at 884-85 (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

Reno built directly on this Court's prior severability ruling in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). In that case, the United States Court of Appeals for the District of Columbia Circuit invalidated the application to the executive branch of a statute prohibiting federal officers and employees from receiving honoraria, but severed and upheld the statute's application to the legislative and judicial branches. *Id.* at 463-64. The court of appeals acknowledged that it could not achieve this result merely by deleting or excising words from the statutory text:

> We cannot, as a technical matter, achieve the intended severance simply by striking the words 'officer or employee' from § 501(b), as that would invalidate the ban beyond the executive branch. . . . However, given the far greater congressional interest in banning honoraria for the legislative and judicial branches, we think it a proper form of severance to strike 'officer or employee' from § 501(b) except in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees.

513 U.S. at 478 n.24 (quoting *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1279 (D.C. Cir. 1993)) (emphasis eliminated). The panel majority's aggressive expansion of severability doctrine drew a sharp dissent from Judge Sentelle, who pointed out that "[i]t is settled that the duty to sever does not empower courts to 'introduce words of limitation in order to uphold the valid applications' of a challenged statute." 990 F.2d at 1295 (Sentelle, J., dissenting) (quoting Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 44.16, at 529 (4th ed. 1986)).

This Court reversed in relevant part, holding that the lower court's method of severance amounted to "tamper[ing] with the text of the statute." 513 U.S. at 478. Underscoring "[o]ur obligation to avoid judicial legislation," the Court rejected the District of Columbia Circuit's attempt to rewrite the statute through severance, choosing instead to limit relief to the parties before the Court. *Id.* at 477, 479.

Reno and *National Treasury Employees Union* reflect this Court's long-settled understanding that when a statute's constitutional applications are textually inseparable from its unconstitutional applications, severance is impermissible. For example, in *Hill v. Wallace*, 259 U.S. 44, 70 (1922), the Court held a federal statute nonseverable when the valid and invalid provisions were "so interwoven" that only a rewrite of the statutory text

would allow the law to stand. The statute's severability clause, the Court explained, "does not give the court power to amend the act" (*id.* at 71), nor does it enable "the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain." *Id.* at 70. Such a remedy would constitute "legislative work beyond the power and function of the court." *Id.*

Likewise, in *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1875), the Court held that although a court may sever a statute "by striking out or disregarding words that are in the [challenged] section," it may not sever "by inserting [words] that are not now there." Amending a statute through the addition rather than deletion of words "would be to make a new law, not to enforce an old one"—a role that "is no part of our duty." *Id.* *See also Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (noting that under the severance doctrine, an invalid portion of a statute "may be *dropped* if what is left is fully operative as a law") (emphasis added; citation omitted).

The Federal Circuit's dismantling and reconstruction of the Harbor Tax is precisely the sort of "tamper[ing] with the text of [a] statute" that this Court has repeatedly condemned. *National Treasury Employees Union*, 513 U.S. at 478. The court below did not identify any textual phrase that could be severed in order to excise the tax on exported goods while preserving all other aspects of the tax, and for good reason: There is none. Plainly, 26 U.S.C. § 4462(a)(1)(A), which includes "the loading of commercial cargo" within the category of "port use" subject to the tax, cannot be severed, because if that provision is severed, then not merely the loading of *goods* but also the loading of *passengers* would be exempted from the tax—a result that the court below squarely rejected. Similarly, the statutory revision mandated by the court below cannot be achieved by excising portions of the statutory definition

of "commercial cargo," since it is impossible to delete words from the phrase "any cargo transported on a commercial vessel, including passengers transported for compensation or hire," in a manner that leaves intact the statute's application to passengers and *imported* goods (as the court below did) while eliminating the statute's application to *exported* goods.[2]

Thus, there is no provision that can be deleted in order to achieve the result reached below; instead, the Federal Circuit had to re-draft the law Congress enacted by effectively inserting the phrase "exported goods" into Congress' itemized list of exclusions from the tax. *See* 26 U.S.C. § 4462(a)(3)(B) (identifying specific exclusions from the category of "commercial cargo" subject to the tax). Because the passenger tax does not "enjoy[ ] a textual manifestation separate from" the tax on exports, *Reno*, 521 U.S. at 883, the court of appeals plainly erred in severing the former from the latter.

The decision below thus violates well-settled rules governing the judicial power to declare laws unconstitutional. If left uncorrected, it will serve as an invitation for courts to invade the legislative domain and add new, judicially created language to federal statutes under the guise of severance. The conflict between this Court's

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[2] The statute's provision stating that "the exporter" shall pay the tax "in the case of cargo to be exported from the United States," 26 U.S.C. § 4461(c)(1)(B), could perhaps be excised while leaving the remainder of the statute intact, but that excision would not achieve the result adopted below—or that mandated by this Court's decision in *U.S. Shoe*—because the tax would remain applicable to exported goods; it would simply by paid by "the shipper" rather than the "exporter." 26 U.S.C. § 4461(c)(1)(C) (providing that "in any other case," the tax shall be paid by "the shipper").

decisions and the rule of law announced below requires resolution by this Court.

II. The Circuits Are Divided Over The Proper Test For Severability

The Federal Circuit's test for severability conflicts directly with the two-part test employed by the First, Third, Eighth, Ninth, and Eleventh Circuits. In the decision below, the court of appeals held that "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." Pet. App. 11a (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). Yet the court of appeals ignored the second element of the test for severability employed by several other circuits—a determination of "functional independence."

The functional independence requirement is a means of ensuring that courts observe the limits on their power to sever federal statutes, in keeping with the principles repeatedly enunciated by this Court in the cases discussed in part I above. A statutory provision is functionally independent only if it is textually distinct from the invalid provisions and can operate fully and independently standing alone. *See, e.g., Alaska Airlines*, 480 U.S. at 684 ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."); *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) ("in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another"). Under the functional independence test employed by several courts of appeals, even if a court concludes that Congress would have enacted the statute absent the unconstitutional aspects, severance is improper if the unconstitutional provisions are so interwoven with the remainder of the statute that mere deletion will not suffice.

The Ninth Circuit explicated this two-step approach in *Board of Nat. Resources v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993), where it held that the question of severability is not determined exclusively by an inquiry into whether Congress would have enacted the statute absent its unconstitutional provisions; instead, a court must also consider "whether the unconstitutional provisions are 'functionally independent' from the remainder" of the statute. The Ninth Circuit explained that "an unconstitutional provision is not considered 'functionally independent' if the 'valid and invalid provisions [are] so intertwined that the Court would have to rewrite the law to allow it to stand.'" *Id.* (quoting *Alaska Airlines*, 480 U.S. at 684). Conversely, an unconstitutional provision *is* functionally independent if "'its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation.'" *Id.* (quoting *United States v. Jackson*, 390 U.S. 570, 586 (1968)).

Likewise, in *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 76 (1st Cir. 1990) (en banc), *vacated on other grounds sub nom.*, *Sullivan v. Massachusetts*, 500 U.S. 949 (1991), the First Circuit held that "[i]n examining severability a court must examine the functional independence of the valid and invalid provisions *and* the intent of the enacting legislature" (emphasis added). The court explained that because the valid and invalid provisions of the challenged federal regulatory scheme were so closely interconnected, "the radical dissection necessary would leave the statute with little resemblance to that intended by the legislature." *Id.* at 76 (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986) (brackets omitted)). Accordingly, the court held, severance was improper. *See also Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1124, 1136 (1st Cir. 1984) (stating test for severability as requiring examination of "(1) the *functional independence* of valid and invalid statutory provisions, and (2) the intent of the enacting legisla-

ture") (emphasis added; citation omitted), *modified on rehearing en banc*, 762 F.2d 1137 (1st Cir. 1985).

In *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854 (8th Cir. 1998), the Eighth Circuit held that the portion of the Religious Freedom Restoration Act ("RFRA") applicable to the States (and declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997)) was severable from the portion applicable to the federal government. The court reasoned that severance was proper because "RFRA's protection against federal interference with religious liberties is *independent and distinct* from its protection against state interference." *Id.* at 859 (emphasis added); *see also id.* (quoting *Alaska Airlines*, 480 U.S. at 684, for the proposition that severance is impermissible "'if the balance of the legislation is incapable of functioning independently'"). Indeed, the text of RFRA easily permitted severance in this manner: Because RFRA applied "to all Federal and State law," 42 U.S.C. § 2000bb-3(a), the court could achieve the desired result simply by deleting the words "and State."

The Third Circuit also follows this two-step approach, in direct contrast to the test for severability announced by the court below. In *EEOC v. Westinghouse Elec. Corp.*, 765 F.2d 389 (3d Cir. 1985), the court explained that "[t]he severability inquiry is two-pronged: (1) are the valid and invalid statutory provisions *functionally independent*; and (2) did the legislature intend the provisions to be severable?" *Id.* at 392 n.2 (emphasis added).[3]

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[3] *See also United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993) ("In determining whether to sever a constitutionally flawed provision, courts should consider whether the balance of the legislation is incapable of functioning independently."); *Estate of Langan v. Nebraska*, 63

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Not only does the Federal Circuit's single-step test *for severability directly conflict with the two-step test* applied by the First, Third, Eighth, Ninth, and Eleventh Circuits, it is deeply flawed in that it allows a court complete freedom to dismantle and rebuild federal statutes—as long as the court concludes that the revised version is something Congress would have enacted. Such a "limitation" on judicial power is plainly no limitation at all. The functional independence requirement, by contrast, ensures that any revisions made by a severing court are consistent with the text and structure of the statute itself, not merely with the court's necessarily subjective and hypothetical assessment of what Congress might have been willing to enact.

In sum, this case squarely presents an important and recurring question that has generated a conflict among the courts of appeals.[4] This Court should grant certio-

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F. Supp. 2d 1025, 1027 (D. Neb. 1999) (refusing to sever when it was unclear "how the arguably constitutional portion of the legislation . . . can function independently from that portion of the statute . . . that is violative of the Eleventh Amendment when both concepts are defined in the statutes as one unitary concept").

[4] Federal courts of appeals applying severability doctrine in the context of constitutional challenges to state statutes have similarly held that courts are limited to excising or deleting unconstitutional language and may not rewrite statutes in order to preserve constitutional applications while invalidating unconstitutional ones. *See, e.g., Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) ("the general federal rule is that courts do not rewrite statutes to create constitutionality"); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) ("We should not . . . treat a severability clause as an invitation from the legislature to write whatever statute we can fashion from the constitutional

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rari to resolve this conflict and adopt the majority view that functional independence is a prerequisite to severability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 2, 2000

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remnants as augmented by our imagination."); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985) ("[E]ven the broadest severability clause does not permit a federal court to rewrite as oppose to excise. Rewriting is work for the legislature . . . .").